

PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 26

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The discipline [Level 2 upgraded to Level 3 requiring five (5) days off without pay and developing a corrective action plan upon return to service] imposed upon Mr.M.R. Niccum on April 28, 2000 for alleged violation of Union Pacific Rules 1.1.2 and 41.2 in connection with charges of allegedly causing damage to a wayside signal appliance in the vicinity of the 'R' Street Lead Switch on the Fresno Subdivision near Sacramento, California was unwarranted, on the basis of unproven charges and in violation of the Agreement.
2. As a consequence of the violation referred to in Part (1) above, Mr. M. R. Niccum shall now '...be compensated for net wage, straight time, overtime and benefit loss suffered as a result of the Carrier's improper assessment of discipline which caused the Claimant to observe a five (5) working day suspension. We further request that the Claimant's personal record be expunged of the Level 2 violation.'

Background

Claimant M. R. Niccum was hired by the Union Pacific Railroad (formerly Southern Pacific Transportation Company – Western Lines) on July 19, 1984, and he thereafter established seniority in various classes. On March 27, 2000, the date of the incident, Claimant was assigned as a ballast regulator operator on System Gang 8503, which was working on the Fresno Subdivision surfacing and lining rail behind System Gang 8501.

While Claimant was performing his duties, a wayside signal appliance (i.e. a battery cut junction box) was pulled out of the ground by a piece of rail. As Claimant described it:

There was two instances. There was the one ahead of me filling in, in front of the tamper. And he was required to fill in ballast so they could tamp it. And apparently he had a problem up there at the same area where I did. And he had struck a signal switch box. And when I got up there he was gone. The operator had left to go in for a urinalysis with [Supervisor] Randy Allen.

So, I continued on. Waited for the tamper to get up to where he had stopped. And he had stopped in the same location where I hit the box. And, well, apparently where I thought I hit the box. Okay? I don't know because I didn't see it. All I know is I got to the same area where he finished and that was where the incident that I had happened. (Carrier's Ex. B, p. 25)

On April 20, 2000, a hearing was held to determine what responsibility, if any, was attributable to Claimant for the damage to the wayside signal box in the vicinity of the "R" Street Lead Switch. By letter dated April 28, 2000, Claimant was notified that he had been found guilty of "a possible violation of Union Pacific Rules 1.1.2 and 41.2."

Rule 1.1.2 (Alert and Attentive) states:

Employees must be careful to prevent injury to themselves or others. They must be alert and attentive when they perform their duties and plan their work to avoid injury.

Rule 41.2 (Operators) provides, in relevant part:

Operators of roadway machines and work equipment are responsible for the efficient operation and proper care of equipment.

Claimant was assessed with Level 2 discipline which, when added to his disciplinary status at that time (Level 2), required the assessment of a Level 3 discipline, i.e. an actual five-day suspension. Claimant's discipline was appealed and progressed through all

levels of the grievance procedure. The parties were not able to resolve the matter, however, which is now before this Board for adjudication.

Findings

The Carrier acknowledges that the central issue here is whether it has presented sufficient evidence to establish Claimant's guilt. Given the testimony and evidence below, this question must be answered in the negative.

First, it must be noted that Claimant was found guilty of a "possible violation" of Rules 1.1.2 and 41.2. Such a "possible," or theoretical, transgression is hardly an adequate basis upon which to impose a suspension. In any disciplinary matter, either the Carrier can meet its burden of proof or it must exonerate the employee. As other arbitrators have noted, conjecture, speculation and inference are not enough. (*NRAB Third Division, Award No. 16166 (Perelson)*; *NRAB Third Division, Award No. 30747 (Malin)*).

In the instant case, the Carrier has failed to sustain its burden of proof, largely because it has been unable to demonstrate that Claimant acted irresponsibly or inattentively in the performance of his duties. The Carrier called only one witness, Supervisor Allen, who did not observe the incident, and he offered hearsay testimony as to what he was told by Foreman Murray, who likewise did not witness the incident.

The Claimant, in contrast, gave a straightforward and credible account of what occurred on March 27, 2000. The signal battery box was buried in the ground and was obscured from his view. The rail gang's cribber had covered the unmarked box's location with rock, and rail had been placed around it. Claimant encountered loose rail,

and when he went to move it with his ballast regular wing, the incident occurred. As Claimant explained, when he came through to move the rail, "it pushed it out, uncovered the battery box." (Carrier's Ex. B, p, 33)

Given Claimant's unrefuted testimony, it is unclear as to whether his equipment hit the signal box or the loose rail hit the box. He really wasn't certain because he couldn't see the partially hidden box. Moreover, while the Carrier contends that Claimant knew he should not use a ballast regular to move rail, Claimant testified without challenge that there was a practice of using a ballast regular wing to push loose rail aside. In fact, he has moved many pieces of trim rail behind the steel gang on a regular basis and was just performing his regular duties. Until the day before his hearing, when Hearing Officer S.J. White told him not to use his machine to nudge loose rail aside, no supervisor had ever corrected Claimant when he engaged in this practice.

In this particular instance, the battery junction box was low in the ground, covered by ballast from the crib reducer machine, and it was accidentally lifted out of the ground when Claimant tried to move the rail out of his way in order to regulate the ballast. Claimant testified persuasively that had the battery box been properly marked ahead of him, he would certainly have avoided moving the rail next to it.

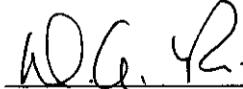
In these circumstances, and in the absence of any proof to the contrary, this Board cannot conclude that Claimant was irresponsible or inefficient. His claim is hereby sustained.

Award

The claim is sustained. The Carrier shall make Claimant whole for the five-day suspension imposed upon him and shall expunge his record of any discipline in connection with the incident of March 27, 2000.

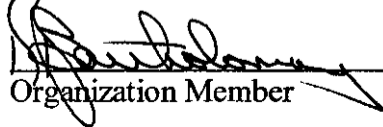


Joan Parker, Neutral Member



Carrier Member

Dated: May 6, 2004



Organization Member

Dated: 5-6-04